IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NUWAY ENVIRONMENTAL LIMITED, ET AL. **Plaintiffs,**	**CIVIL ACTION**
	NO. 03-5375
vs.	
UPPER DARBY TOWNSHIP, ET AL. **Defendants.**	

MEMORANDUM AND ORDER

Tucker, J. **January _____, 2006**

Presently before the Court are Defendants' Motions for Summary Judgment (Docs. 50 & 52). For the reasons set forth below, upon consideration of the parties' arguments, the entire record, and the applicable law, the Court is of the opinion that the Defendants' Motions for Summary Judgment should be **GRANTED**.

BACKGROUND

Plaintiff Richard Meade ("Meade"), owner of NuWay Environmental Limited ("NuWay Limited"), a solid waste recycling business located at 333 Boro Road ("333 Boro") in Upper Darby Township,[1] brings this action against Defendants, the Borough of Clifton Heights ("Clifton Heights"), Upper Darby Township ("Upper Darby"), Director of the Licences and

[1] The Delaware County Tax Assessor identifies Plaintiff's property as Assessor's Parcel No. 16-13-00888-01, but does not include a street address. The parties have agreed, for the purposes of this litigation, that the property is located in Upper Darby and has a street address of 333 Boro Road, Primos, PA 19018-2112.

Inspection Department for Upper Darby Jeffrey Gentile, PE ("Gentile"), Upper Darby Councilman Thomas Micozzie ("T. Micozzie"), State Representative from Delaware County Nicholas Micozzie ("N. Micozzie"), Chief Administrative Officer for Upper Darby Thomas Judge, Jr. ("Judge") and Members of the Upper Darby Zoning Hearing Board (the "Zoning Board"), Jacob Bierling, Jr. ("Bierling"), Harry Patterson ("Patterson"), John Rooney ("Rooney"), Elizabeth Salvucci ("Salvucci") and Robert White ("White") (collectively the "Upper Darby Defendants").[2]

Plaintiff alleges that Defendants, through a campaign of personal hostility (1) influenced zoning board officials to deny Plaintiff a "Use & Occupancy" ("Use") permit for uses permitted as a right; (2) treated Plaintiff differently than other similar businesses; (3) passed *ex post facto* ordinances directed specifically to prevent Plaintiff from using his property; (4) intentionally garnered the support of neighboring residents to oppose Plaintiff's lawful use of his property; and (5) filed a complaint with the Pennsylvania Commonwealth Department of Environmental Protection ("DEP") resulting in the DEP obtaining a search warrant to enter and search the 333 Boro property. Plaintiff Meade brings the following claims in his Complaint: violation of Plaintiff's substantive due process rights brought pursuant to 42 U.S.C. § 1983 and violation of Plaintiff's equal protection rights under the Fourteenth Amendment of the United States Constitution (Count I); civil conspiracy to deprive Plaintiff of his civil rights brought pursuant to 42 U.S.C. § 1985 (3) (Count II); and inverse condemnation (Count III).

Plaintiff owned and operated NuWay Trash Removal ("NuWay Trash"), a trash transfer station, in Delaware County, Pennsylvania. In 1998, Plaintiff sold NuWay Trash to Waste

[2] Motions have been filed separately by Clifton Heights (Doc. 50) and Upper Darby Defendants (Doc. 52).

Management, Inc. ("Waste Management"). In 2000, Plaintiff decided to purchase an industrial property in Upper Darby in order to get back into the waste management business. However, Plaintiff alleges that Defendant Judge dissuaded the property owner from whom Meade was attempting to buy the property by instructing him "not to sell to Meade." Pl.'s Compl. 6. As a result, Meade could not purchase the property, and instead used 333 Boro, a property he owned, which was zoned for manufacturing and industrial uses.[3]

In November or December 2000, Upper Darby received a complaint that Plaintiff was "building without permit" on the 333 Boro property. Upper Darby Defs.' Mot. Summ. J. 1; *see* Ex. 1. Accordingly, on December 20, 2000, on behalf of his business NuWay Limited, Plaintiff submitted an application to Upper Darby for a Use permit for the purpose of "recycling: wood, metal and roofing material" on the property. *See* Ex. T-2. Plaintiff's application was denied on the same date because it allegedly failed to fit into any of the thirty plus enumerated uses in the Upper Darby Manufacturing and Industrial Ordinances of 1986. *See id*. Plaintiff was advised that he must file for a Special Exception from the Zoning Board. Plaintiff then appealed.[4] Ex. 4.

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[3] The zoning code in effect for manufacturing and industrial districts for Upper Darby specifically permits "manufacturing, compounding, assembly, processing and distribution of products" from the following previously prepared materials:

> sheet cellophane, polyethylene, and similar material, canvas, cloth, rope, cord, twine, glass, china, plastic, feathers, felt, fiber, fur, hair, (excluding washing, curling and dying), leather, paper, cardboard, ceramics, textiles, wood (except chemical treatment or preservation), rubber and synthetic processing.

Pl.'s Compl. 6.

Thus, Plaintiff deduces that a recycling business of solid non-hazardous waste products whereby materials would be separated, processed and distributed to third-party recycling facilities was legal without a variance under the Upper Darby Zoning Code.

[4] According to Plaintiff, following the denial of his application, Defendant N. Micozzie informed Plaintiff that he would lose on appeal as well.

Plaintiff's appeal was placed on the January 25, 2001 Zoning Board agenda.[5] The Zoning Board denied Meade's appeal of the denial of his Use permit on or about January 26, 2001. Thereafter, on March 2, 2001, Meade again applied for a Use permit, which Defendant Gentile denied. On May 31, 2001, Meade's zoning hearing appeal from the March 2, 2001 denial of his second application came before the Zoning Board.[6] On or about June 29, 2001, the Zoning Board denied Meade's appeal.

DEP Investigator Kevin Bauer ("Bauer") subsequently conducted inspections of the 333 Boro property between January 5 and January 10, 2001.[7] *See* Ex. 9. Based upon Bauer's observations and the Solid Waste Authority Act provisions, Bauer determined that Plaintiff needed a DEP permit for the illegally operating trash transfer station. Plaintiff was cited for unlawfully operating a recycling business.[8]

After being denied a Use permit for a second time, Plaintiff decided to lease the property to Harmon's Recycling for storage of empty truck containers. Again, a Use permit was denied

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[5] Since the proposed use by Meade was at a property which bordered Clifton Heights, council member Ed Martin ("Martin") received notice of the zoning appeal. Defendant Clifton Heights admits that Clifton Heights constituents, including Clifton Heights Mayor Mary Natalie, had contacted Martin about Meade's zoning hearing appeal and his proposed use of the property.

[6] Martin concedes to talking with N. Micozzie and possibly T. Micozzie before the hearing in regards to his objections to Meade's proposed use of the property. Martin and T. Micozzie spoke at the zoning hearing appeal and both opposed Meade's proposed use for reasons previously expressed at the January 25, 2001 hearing. However, Martin alleged that he never communicated with any of the zoning hearing board members concerning Meade's appeals.

[7] According to Meade, Defendant N. Micozzie and his family allegedly reported Plaintiff to the Department of Environmental Protection ("DEP").

[8] Plaintiff avers that the Micozzie family sought to protect their real estate interest in property located less than a mile from Plaintiff's business. Plaintiff claims that Clifton Heights officials conspired with the Micozzies in order to deny his appeal. Plaintiff avers that, as part of an ongoing harassment campaign, in 2001, Upper Darby instituted an ordinance which required that a permit from the DEP was required before seeking an occupancy permit from the township.

and the Zoning Board denied Plaintiff's appeal.[9] Following this rejection, Plaintiff investigated the use of his former property, which had been sold to Waste Management in 1988. Plaintiff alleges that despite Waste Management never applying for or ever obtaining any zoning permits, Waste Management had never been cited or been opposed by Defendants.[10]

Plaintiff claims that this case goes beyond a two-time denial of Plaintiff's zoning applications, but rather involves a conspiracy emanating from the Micozzie family's personal animus toward Plaintiff.[11] Plaintiff avers that the conspiracy was spearheaded by N. Micozzie, and involved numerous members of the Upper Darby community. Plaintiff alleges that the joint offices of N. Micozzie and T. Micozzie worked very closely with Upper Darby Director of Licensing, Inspector Gentile, as well as the DEP and the individual members of the Upper Darby Zoning Hearing Board to oppose Meade. According to Plaintiff, T. Micozzie brought in the Mayor of Clifton Heights, Mary Natalie, as well as Borough Councilman Martin to work as part of the team to oppose the Meade/Nuway zoning applications.

Plaintiff seeks judgment against defendants in excess of Two Million Five Hundred Thousand ($2,500,000.00) Dollars, together with punitive damages against the individual defendants, interest, legal fees and cost and such other and further relief as the Court may deem

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[9] According to Plaintiff, the Micozzies warned Harmon not to associate with Plaintiff; and Clifton Heights government officials, again, supported the Micozzies.

[10] Plaintiff alleges that Waste Management enjoys a friendly relationship with the Micozzie family and is therefore afforded different and better treatment in the community than Plaintiff.

[11] In the late-1970s, following a dispute between Meade and N. Micozzie regarding the property that was later sold to Waste Management (the "Oak Road Property"), Meade filed an ethics complaint against N. Micozzie. Meade alleges that the ethics complaint instilled a personal animus in N. Micozzie causing him to seek revenge against Meade over 30 years later when Meade decided to return to the trash business in Upper Darby in December 2000. Plf.'s Res. To Defs. Mots. Summ J. 8-9.

just and proper.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56 ©. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial." *Id.* That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of

evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." *Big Apple BMW, Inc. v. BMW of N.A., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). The court must view the evidence presented in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255.

DISCUSSION

A. Municipal Liability Under 42 U.S.C. 1983

1. Plaintiff's Due Process Claim

In its Motion for Summary Judgment (Doc. 50), Defendant Clifton Heights argues that a municipality can only be liable under 42 U.S.C. § 1983 (Count I) if the municipality itself, through the implementation of a municipal policy or custom, causes the constitutional violation. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 691-95 (1978). A municipal policy is made where a decision-maker, with actual authority to establish municipal policy, issues an official proclamation, policy or edict. *Beck v. City of Pittsburgh*, 89 F. 3d 966, 971 (3d Cir. 1996). Whether an individual had final policy making authority is a question of state law. *Praprotnik*, 485 U.S. at 124 (quoting *Pembaur v. Cincinnati*, (465 U.S. 469, 483 (1986)).

Defendant Clifton Heights argues that municipal liability may not be premised on respondeat superior. *Monell*, 436 U.S. at 693-94. Local agencies are not liable simply because they employ a constitutional tortfeasor. *Bd. of County Comm'rs*, 520 U.S. 397, 403 (1997). Thus, an employee's invidious intent "is not imputed to the government agency. . . [because] 'if the mere exercise of discretion by an employee could give rise to a constitutional violation, the

result would be indistinguishable from respondeat superior liability." *Holt Cargo Sys., Inc. v. Del. River Port Auth.*, 20 F. Supp. 2d 803, 840 E.D. Pa. 1998) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126. (1987)).

Defendant Clifton Heights acknowledges that a substantive due process claim may also be shown by proof that Clifton Heights knew of and approved of a widespread practice that is so well-settled as to constitute a custom. *See Praprotnik*, 485 U.S. at 127. Defendant Clifton Heights argues that in order to be liable in an action brought pursuant to 42 U.S.C. § 1983 it must be found to be the cause of the alleged constitutional violation. *Baker v. Monroe Twp.*, 50 F. 2d 1186 (3d Cir. 1995). Defendant Clifton Heights argues that there is no evidence it was the moving force behind any action against Meade. At most, Defendant concedes that Clifton Heights Councilman Martin met with Representative N. Miccozzie or Upper Darby Councilman T. Miccozzie and local residents to discuss opposition to Meade's planned use of property in Upper Darby. Despite this concession, however, Defendant Clifton Heights argues that in order to state a claim that a municipality's land use decision violates substantive due process pursuant to 42 U.S.C. § 1983, plaintiff must establish that the government's deprivation of that property interest "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1997) ("the substantive component of the due process clause is violated by executive action only when 'it can properly be characterized as arbitrary or conscience shocking, in a constitutional sense'") (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992)); *United Artists Theater Circuit, Inc. v. Twp. of Warrington, Pa.*, 316 F. 3d 392 (3d Cir. 2003). Defendants[12] argue that its land

[12] In regards to Plaintiff's substantive due process claims, Defendant Clifton Heights and Upper Darby Defendants incorporate the same legal arguments and analysis in their respective Summary Judgment Motions (Docs. 50 & 52).

use decision regarding Meade's land does not rise to the level that would "shock the conscience."

In adopting the "shocks the conscience" standard of *Lewis*, the Third Circuit specifically repudiated the "improper motive"[13] test which had previously prevailed, finding that only the "most egregious official conduct" will rise to the level of a constitutional violation. *See United Artists*, 316 F. 3d at 399-400. Although a decision as to whether specific conduct is conscience shocking depends on the facts of each case, Defendants argue that there have been no facts developed, elicited or even properly alleged, that any action or behavior of Defendants, individually or collectively, rose to egregious and irrational behavior, i.e. conscience shocking.[14]

Plaintiff directly disagrees. With respect to the municipal Defendants, a plaintiff must show that the constitutional violation was caused by the implementation or exercise of a municipal policy or custom. *Monell*, 436 U.S. at 691-95. As held by the Supreme Court, "authority to make a municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority. . ." *Praprotnik*, 485 U.S. at 124 (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1996). Plaintiff alleges that all three governmental groupings involved in this case (N. Micozzie's State Representative office, Upper Darby and Clifton Heights) worked in lock-step against Plaintiff. Pl.'s Res. To Defs.' Mots. Summ. J. 29-30. Thus, Plaintiff concludes that as far as the municipal Defendants are concerned, a jury could

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[13] In *United Artists*, the Third Circuit warned that, "land use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives. *United Artists*, 316 F.3d at 402.

[14] Defendants allege that no Third Circuit Court has yet found that a land use decision meets the conscience shocking standard. In a recent opinion granting summary judgment in a land use case in which a violation of substantive due process was alleged, Judge Baylson stated: "Significantly, every Third Circuit and District Court to consider this issue post *United Artists* has refused to find a violation of substantive due process in the land use context. *The Dev. Group, LLC, et al. v. Franklin Twp. Bd. of Supervisors, et al.*, 2004 WL 2812049, at *14 (E.D. Pa. Dec. 7, 2004).

find that policy makers in each of the municipalities participated in the decisions to take the actions which violated the substantive due process rights of Plaintiff or acquiesced in the ongoing policy to prevent Plaintiff from obtaining zoning approval, such that it could be deemed to be official municipal policy. Pl.'s Res. To Defs.' Mots. Summ. J. 30.

Even assuming that any of the named Defendants possessed authority to implement municipal policy or custom, the determinative question is whether the Zoning Board's land use policy decision rises to the level of shocks the conscience. Plaintiff alleges that the present case shocks the conscience because Defendants' behavior, motivated by a personal animus toward Plaintiff, was so egregious that it was "shocking." Plf.'s Res. To. Defs.' Mots. Summ. J. 2-3. However, in *United Artists*, the Third Circuit held that "improper motive" alone is insufficient to satisfy the conscience-shocking standard. *United Artist*, 316 F.3d at 400. Moreover, "improper motives, particularly personal animus toward a plaintiff," do not shock the conscience for constitutional purposes. *Am. Marine Rail*, 289 F. Supp. 2d 569 (D.N.J. 2003).[15] Therefore, even assuming that the Micozzie family was motivated by an improper personal animus against Plaintiff, Plaintiff fails to present any additional evidence to meet the shocks the conscience

[15] In *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274 (3d Cir. 2004)(plaintiffs asserted that zoning officials refused certain permits and approvals and applied unnecessary enforcement actions and subdivision requirements to plaintiff's property that were not applied to other parcels). Judge Chertoff noted that the Third Circuit previously observed that

> [e]very appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but 'it is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983.

Id. at 286 (citing *United Artists*, 316 F.3d at 402) (quoting *Creative Env'ts., Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982)).

standard.[16]

In order "[t]o survive summary judgment under the shocks the conscience test . . . [plaintiff] must have adduced evidence from which a reasonable jury could conclude that the Board's actions did not serve any rational land use purpose. *Corneal v. Jackson Twp.*, 313 F. Supp. 2d 457, 466 (M.D. Pa. 2003) (footnote and citation omitted), *aff'd*, 94 Fed. Appx. 76 (3d Cir. 2004). Unless the evidence indicates that the challenged decision is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process. *Id*. In the present case, Plaintiff has failed to present evidence, beyond allegations of improper motives due to a tenuous personal animus toward plaintiff and an alleged conspiracy between and among Defendants, to suggest that the Zoning Board's decision regarding his property did not serve any rational land use purpose. Plf.'s Res. To. Defs.' Mots. Summ. J. 2-5, 16-31. Accordingly, Plaintiff's complaints of the Zoning Board do not rise to a conscience-shocking level. As a matter of law, the Court grants summary judgment for Defendant Clifton Heights and Upper Darby Defendants on Plaintiff's due process claims alleged in Count I of his Complaint.

2. Plaintiff's Equal Protection Claim

Plaintiff further asserts an equal protection claim alleging selective treatment in Count I of his Complaint. In order to properly set forth an equal protection claim based upon purported selective treatment, a plaintiff must allege and demonstrate that (1) the plaintiff, compared with

[16] The Third Circuit has consistently held that Pennsylvania's procedures for challenging zoning ordinances provide procedural due process as a matter of law. *Rogin v. Bensalem Twp.*, 6126 F.2d 680 (3d Cir. 1980). Plaintiff has not sufficiently alleged or proven that the deprivations alleged in this case were not preceded by notice and an opportunity for hearing that was appropriate to the nature of the case.

others similarly situated, was selectively treated and (2) the selective treatment was motivated by an intent to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure. *Homan v. City of Reading*, 15 F. Supp. 2d 696, 702 (E.D. Pa. 1998).

In reviewing an equal protection claim, if the action in question does not burden a fundamental constitutional right or target a quasi-suspect class, the "challenged classification must be upheld 'if there is any reasonably conceivable set of facts that could provide a rational basis for the classification.'" *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993) (quoting *FCC v. Beach Commc'ns*, Inc., 508 U.S. 307, 313 (1993)); *see Tillman v. Lebanon County Corr. Facility*, 221 F. 3d 410, 423 (3d Cir. 2000). A plaintiff who fails to allege membership of a suspect or otherwise protected class may nonetheless bring an equal protection claim if it can be shown that the defendants, acting under color of state law, intentionally treated plaintiffs differently from others similarly situated, and that there is no rational basis for the difference in treatment. *Highway Materials, Inc. v. Whitemarsh Twp.*, 2004 WL 2220974, at *21 (E.D. Pa. Oct. 4, 2004). A plaintiff must at least allege and identify the actual existence of similarly situated persons who have been treated differently and that the government has singled out plaintiff alone for different treatment. *See City of Cleburne v. Cleburne Living Ctr.*, U.S. 432, 439 (1985).

In their Motions for Summary Judgment (Docs. 50 & 52), Defendants Clifton Heights and Upper Darby assert that the allegations set forth in Plaintiff's Complaint and the evidence adduced during discovery regarding Plaintiff's equal protection claim are insufficient to state an equal protection claim as a matter of law. Upper Darby Defendants contend that Plaintiff has not

stated a viable equal protection claim because Plaintiff does not allege any basis for asserting inclusion within a suspect classification and, further, has failed to establish any other individual or entity which is similarly situated and has been treated differently. Moreover, Defendant Clifton Heights argues Plaintiff erroneously attempts to present his equal protection claim "as a devise to dilute the stringent requirements needed to show a substantive due process violation." *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 287 (3d Cir. 2004).

Plaintiff avers that all that is required to defeat summary judgment is to identify the disparity of treatment and present Waste Management, a similar situated business permitted to operate without a permit, while Plaintiff has not. Plaintiff alleges that his selective treatment was motivated by a bad faith or malicious intent to discriminate on the basis of Defendant N. Micozzie's personal animus and misuse of his political capital in Upper Darby and Clifton Heights in order to punish or inhibit Plaintiff from exercising his constitutional rights. Plf.'s Res. To Defs.' Mots. Summ. J. 32.

However, beyond alleging that the Zoning Board's land use decision regarding Plaintiff's property was intentionally motivated by bad faith, Plaintiff fails to present any evidence to support his allegation. The record is devoid of facts to suggest that Defendants acted in bad faith and intentionally treated Plaintiff differently from other similarly situated companies. Even assuming that Waste Management qualifies as a similarly situated company receiving favorable treatment in contrast to Plaintiff, beyond unsupported speculation and allegations, Plaintiff fails to illustrate that there are no reasonably conceivable set of facts that could provide a rational basis for the difference in treatment. Plf.'s Res. To Defs.' Mots. Summ. J. 8 n.6. Accordingly, as a matter of law, the Court grants summary judgment for Defendant Clifton Heights and Upper

Darby Defendants regarding Plaintiff's equal protection claims alleged in Count I of his Complaint.

B. Civil Conspiracy Under Pennsylvania Law

Plaintiff asserts a civil conspiracy claim in Count II of his Complaint. Under Pennsylvania law, to successfully establish a claim for civil conspiracy, "the following elements are required: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; (3) actual legal damage." *General Refractories Co. V. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003); *McKeeman v. CoreStates Bank*, 751 A. 2d 655, 659 (Pa. Super. 2000).

Upper Darby Defendants assert that Plaintiff's claims against each of the individual Upper Darby Defendants in their official capacities must be dismissed. Upper Darby Defs.' Mot. Summ. J. 30-31. According to Upper Darby Defendants, under *Hafer v. Melow*, 502 U.S. 21, 25 (1991), there is a complete symmetry between a governmental entity as a defendant and the officers who hold positions in that governmental entity in their official capacity. Accordingly, judgment can only be recovered against the municipality in such actions. *Id.* Defendants argue that since Plaintiff could only recover against Upper Darby for any judgment against Mr. Judge, Mr. Gentile, Mr. Bierling, Mr. Patterson, Mr. Rooney, Ms. Salvucci, Mr. White and Councilperson T. Micozzie in their official capacities, the claims against those in their official capacity must be dismissed. Upper Darby Defs.' Mot. Summ. J. 30-31.

Furthermore, Defendants argue that the members of the Zoning Board are entitled to

quasi-judicial immunity, which "attaches when a public official's role is 'functionally comparable' to that of a judge." *Hamilton v. Leavy*, 322 F.3d 776, 785 (3d Cir. 2003) (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)). Defendants claim that because each of the individual Defendants is entitled to qualified immunity for any claims against them in their individual capacities, and Plaintiff could only recover against Upper Darby for any judgment against the individual members of the Zoning Board, the claims against the officials in their official capacities must be dismissed.[17] Upper Darby Defs.' Mot. Summ. J. 30-31. By removing the Zoning Board Defendants in their official and individual capacity, Defendants argue that Plaintiff cannot proceed with the conspiracy claim since Upper Darby cannot conspire with itself. In the alternative, Defendants argue that even if the Court were to find that the individual defendants were not entitled to absolute or qualified immunity, Plaintiff's conspiracy claims would fail because Plaintiff has adduced no proof that there was an agreement or any discussion at all to ensure that Meade did not receive permits.[18]

Plaintiff alleges that Upper Darby Defendants' assertion that the individual Defendants are immune to liability in their individual capacity and are protected under the qualified immunity defenses is wholly frivolous and without merit. Pl.'s Res. To Defs.' Mots. Summ. J. 35-36. In regards to Defendants' argument that the claims against each of the individual Upper

[17] A government entity cannot conspire with its agents if those agents are acting in their official capacities. *Robinson v. Canterbury Village, Inc.*, 848 F.2d 424, 431 (3d Cir. 1988) (affirming the district court's holding that a corporation cannot conspire with its president). Thus, Upper Darby Defendants assert that the members of the Zoning Hearing Board, Mr. Judge, Mr. Gentile, State Representative Micozzie, and Councilperson Micozzie (and co-defendant Clifton Heights) should be dismissed from this matter, leaving Upper Darby Township as the sole defendant.

[18] Defendant Clifton Heights argues that Plaintiff's Complaint fails to demonstrate a violation of any federal law or any agreement by the Borough of Clifton Heights to do an unlawful act or a lawful act by unlawful means. Clifton Heights Def.'s Mot. Summ. J. 17-18.

Darby Defendants in their official capacity must be dismissed, Plaintiff claims that it is well established that a plaintiff may seeks to sue a governmental official in his personal capacity for the actions he takes under color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Scheuer v. Roads*, 416 U.S. 232, 237-38 (1974). On the merits, to establish personal liability in a Section 1983 action, Plaintiff asserts that it is enough to show that the official, acting under color of state law, caused the deprivation of the federal right.[19] *Kentucky v. Graham*, 473 U.S. at 165.

Furthermore, Plaintiff argues that a governmental official performing discretionary functions is entitled to qualified immunity in his individual capacity if his conduct does not violate constitutional standards in light of clearly established law at the time of the alleged violation. *Anderson v. Craton*, 483 U.S. 635, 639 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity standard "gives ample room for mistake in judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Thus, according to Plaintiff, the determinative question appropriately left for a jury to determine is whether any of the named Defendants were plainly incompetent or knowingly violated the law at the time of the alleged violation.

The Court disagrees. Upon review of the record, Plaintiff fails to present evidence, beyond alleged speculation, to establish the elements required to successfully prove a claim for civil conspiracy. Plaintiff has adduced no proof that there was an agreement or any discussion at all between and among Defendants or that an official, acting under color of state law, caused the deprivation of Plaintiff's federal right. Instead, Plaintiff relies upon the mere "possibility that the

[19] Plaintiff notes that no "official policy or custom" is required to be proved in a personal liability civil rights action. *Kentucky v. Graham*, 473 U.S. at 165.

jury can infer from the circumstances that [the alleged conspirators] had a meeting of the minds and thus reached an understanding to achieve the conspiracy's objectives." Pl.'s Res. To Defs. Mots. Summ. J. 33. Accordingly, as a matter of law, the Court grants summary judgment for Defendant Clifton Heights and Upper Darby Defendants regarding Plaintiff's civil conspiracy claims alleged in Count II of his Complaint.

C. Inverse Condemnation

In their Motions for Summary Judgment (Docs. 50 & 52), Clifton Heights and Upper Darby Defendants argue that Plaintiff's claim of a taking through inverse condemnation is not "ripe" because Plaintiff has not availed himself of the state procedure for seeking just compensation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985); *See Cowell v. Palmer Twp.*, 263 F.3d 286, 290 (3d Cir. 2001). Applying the ripeness doctrine to inverse condemnation claims in Pennsylvania). The Court in *Cowell* noted that "Pennsylvania's Eminent Domain Code: provides inverse condemnation procedures through which a landowner may seek just compensation for the taking of property." *Cowell*, 263 F.3d at 290. Given that the plaintiffs in *Cowell* did not avail themselves of the eminent domain procedures prior to filing suit based on an inverse condemnation, the Court dismissed their claim. *Id.*

In this case, Defendants argue that even if Plaintiff has availed himself of state court procedures, which he did not, Plaintiff's takings claim still fails because Plaintiff cannot establish a regulatory taking occurred. Under its police power, a township may, within limitations, regulate the uses of property within its jurisdiction to promote the public good. The Third

Circuit has directed that "[t]he initial step in any taking analysis . . . is whether the challenged governmental action advances a legitimate public interest," and "[i]n this step, the governmental action is entitled to a presumption that it does advance the public interest." *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1030 (3d Cir. 1987) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978)).

[A] regulatory taking occurs only when the government's action deprives a landowner of all economically viable uses of his or her property. *Cowell*, 263 F.3d at 291. A regulatory taking may either: (a) deprive a landowner of all uses of the property; or (b) limit the use of the property to such an extent that the adverse economic impact on the property owner, and the extent to which reasonable investment-backed expectations are denied, resulting in no reasonable economic use of the land. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), and *Penn Cent. Transp. Co.*, 438 U.S. 104 (1978)). Defendants argue that Plaintiff has not been deprived of all economically viable use of the land and asks the Court to take judicial notice that the Upper Darby Manufacturing and Industrial Ordinances allow at least 30 different types of uses in the particular zone at issue.[20]

Plaintiff asserts that his takings claim survives summary judgment because as held by the Pennsylvania Commonwealth Court, regulatory restrictions constitute a taking requiring just compensation where the actions of a governmental entity have substantially deprived the landowner of the beneficial use and enjoyment of the property. *Fischer v. Cranberry Twp. Zoning Hearing Bd.*, 819 A.2d 181, 184 (Pa. Cmmwlth.), *app. den.* 837 A.2d 1179 (Pa.

[20] *See supra* n. 2. Article VII, Section 701 of the Upper Darby Zoning Ordinance of 1986 outlines the primary uses permitted by right in any manufacturing and industrial district. Ex. NT-3.

Cmmwlth. 2003). Plaintiff asserts that his property has lain fallow over the last five years because of the actions of these defendants. Plf.'s Res. To Defs.' Mots. Summ. J. 35. Plaintiff was denied a Use permit for the purpose of "recycling: wood, metal and roofing material" on his property. A Use permit application and appeal were denied to Harmon's Recycling when it attempted to lease Plaintiff's property for the storage of empty truck containers. These represent only two types of uses of Plaintiff's property. As Defendants have pointed out, the Upper Darby Manufacturing and Industrial Ordinances permit a plethora of different types of uses in the particular zone at issue.[21]

Upon review of the record, Plaintiff has failed to prove that the Zoning Board's ruling denying Plaintiff a Use permit pursuant to the Upper Darby Manufacturing and Industrial Ordinances did not benefit the public interest and has deprived Plaintiff of *all* uses of his property or has left him with *no* reasonable economically viable use of his property. Accordingly, as a matter of law, the Court grants summary judgment for Defendant Clifton Heights and Upper Darby Defendants as to Plaintiff's takings through inverse condemnation claim alleged in Count III of his Complaint.

CONCLUSION

After careful review of the record, the Court concludes that Defendant Clifton Heights' Motion for Summary Judgment and Upper Darby Defendants' Motion for Summary Judgment are both granted. Count I, II and III are dismissed with prejudice. An appropriate Order follows.

[21] Defendants assert that Plaintiff's application was denied on the same date because it allegedly failed to fit into any of the thirty plus enumerated uses in the Upper Darby Manufacturing and Industrial Ordinances of 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NUWAY ENVIRONMENTAL LIMITED, ET AL. **Plaintiffs,**	**CIVIL ACTION**
vs.	**NO. 03-5375**
UPPER DARBY TOWNSHIP, ET AL. **Defendants.**	

ORDER

AND NOW, this ____ day of January, 2006, upon consideration of Clifton Heights' Motion for Summary Judgment (Doc. 50), Upper Darby Defendants'[22] Motion for Summary Judgment (Doc. 52) and Plaintiff's Consolidated Response thereto (Doc. 55), **IT IS HEREBY ORDERED AND DECREED** that Defendant Clifton Heights and Upper Darby Defendants' Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that**JUDGMENT is ENTERED** in favor of Defendants and against Plaintiff on Counts I, II and III of Plaintiff's Complaint and the Clerk of the Court shall mark the above-captioned case as **CLOSED**.

BY THE COURT:

[22] Upper Darby Defendants include Upper Darby Township, Director of the Licences and Inspection Department for Upper Darby Jeffrey Gentile, PE, Upper Darby Councilman Thomas Micozzie, State Representative from Delaware County Nicholas Micozzie, Chief Administrative Officer for Upper Darby Thomas Judge, Jr. and Members of the Upper Darby Zoning Hearing Board, Jacob Bierling, Jr., Harry Patterson, John Rooney, Elizabeth Salvucci and Robert White.

_____

Hon. Petrese B. Tucker, U.S.D.J.